

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1330

COMMONWEALTH

vs.

MITCHELL J. MACCONNELL.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a jury trial in the District Court, the defendant was convicted of violation of an abuse prevention order. See G. L. c. 209A, § 7. On appeal, the defendant argues that the conviction should be vacated and the case remanded for a new trial because one of the Commonwealth's theories of guilt at trial was not supported by sufficient evidence, and the jury were not asked to specify the theory of guilt on which the verdict rested. We affirm.

Background. On September 1, 2016, a District Court judge issued a one-year abuse prevention order requiring the defendant, in relevant part, (1) not to abuse the plaintiff "by harming, threatening or attempting to harm [her] physically or by placing [her] in fear of imminent serious physical harm" (no-abuse provision), (2) not to contact the plaintiff "in person,

by telephone, in writing, electronically or otherwise, either directly or through someone else, and to stay at least 100 yards away from [her] even if [she] seems to allow or request contact" (no-contact provision), and (3) "TO IMMEDIATELY LEAVE AND STAY AWAY FROM THE PLAINTIFF'S RESIDENCE . . . located at [street address], Worcester, MA or wherever else [the defendant] may have reason to know [she] may reside" (stay-away provision).

In compliance with the stay-away provision of the order, the defendant moved out of the Worcester apartment, which he had been sharing with the plaintiff, as well as two other roommates. A short time later, the plaintiff also moved out of the Worcester apartment, taking all of her belongings with her to a new residence in Greenfield. Subsequently, the defendant moved back into the Worcester apartment. On the evening of April 8, 2017, the defendant picked up the plaintiff in Greenfield and drove her to the Worcester apartment.¹ The two sat on a couch, drank alcohol, and then got into an argument. The defendant physically attacked the plaintiff.² After the assault, the defendant went to his bedroom and the plaintiff slept on the

¹ The plaintiff testified that, despite the abuse prevention order, the two contacted each other and maintained a relationship while the order was in effect.

² The jury acquitted the defendant on charges of strangulation or suffocation and assault and battery on a family or household member, stemming from this attack.

couch. The plaintiff reported the incident to the police six months later.

Discussion. The defendant does not dispute that the Commonwealth presented sufficient evidence to establish that he violated the abuse prevention order by abusing the plaintiff, by contacting the plaintiff, and by failing to stay away from the plaintiff's Greenfield residence. He argues only that the jury's verdict may have rested solely on the theory that the defendant failed to stay away from the Worcester apartment, and that this theory was not supported by evidence, because that was not the plaintiff's residence at the time of the alleged violation.³ Because the jury returned a general verdict, the defendant argues, there is no way of knowing whether the conviction rested on a theory devoid of evidentiary support, and therefore, the conviction must be vacated. See Commonwealth v. Plunkett, 422 Mass. 634, 639-640 (1996) ("there must be evidentiary support for each theory of guilt on which the judge tells the jury they may find the defendant guilty").

We need not determine whether the defendant's return to the Worcester apartment after the plaintiff moved out of it constituted a violation of the abuse prevention order, because

³ The prosecutor argued that the defendant moving back into the Worcester apartment was one of many violations of the abuse prevention order.

the jury were not instructed to consider this theory. The judge's instructions to the jury referenced only an order to stay away from the plaintiff's "household or multi-family dwelling," without specifying a particular address. The evidence was uncontested at trial that the plaintiff lived in Greenfield and not at the Worcester apartment at the time of the alleged violation. Therefore, it is exceedingly unlikely that the jury would have found a violation of the stay-away provision due to the defendant's presence at the Worcester apartment but not due to his presence at the plaintiff's uncontested residence in Greenfield.

Equally implausible is the proposition that the jury convicted the defendant for violating only the stay-away provision of the abuse prevention order. Although the Commonwealth charged a single count of violating the abuse prevention order, it presented evidence of the defendant's interactions with the plaintiff over the course of a day, the entirety of which could be viewed as one continuing violation from the moment the defendant picked up the plaintiff at her Greenfield residence to the time when she eventually left the Worcester apartment. See Shea, 467 Mass. at 798, quoting Commonwealth v. Santos, 440 Mass. 281, 285 (2003) ("the facts show[ed] a continuing course of conduct, rather than a succession of clearly detached incidents"). Under the

circumstances, in the light most favorable to the Commonwealth, see Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), the evidence was sufficient to sustain all theories presented to the jury.

Judgment affirmed.

By the Court (Kinder, Singh & McDonough, JJ.⁴),


Clerk

Entered: August 5, 2019.

⁴ The panelists are listed in order of seniority.